FCC 96-182

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 19, 1996 Released: April 19, 1996

Comment Date: May 16, 1996
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By the Commission:

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I. INTRODUCTION AND OVERVIEW

1. In enacting the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[2] The statute imposes obligations and responsibilities on telecommunications carriers, particularly incumbent local exchange carriers (LECs), that are designed to open monopoly telecommunications markets to competitive entry.[3] The 1996 Act also includes provisions that are intended to promote competition in markets that already are open to new competitors. The 1996 Act seeks to develop robust competition, in lieu of economic regulation, in telecommunications markets.[4] The Act envisions that removing legal and regulatory barriers to entry and reducing economic impediments to entry will enable competitors to enter markets freely, encourage technological developments, and ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace.

2. Congress entrusted to this Agency the responsibility for establishing the rules that will implement most quickly and effectively the national telecommunications policy embodied in the

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 [hereinafter 1996 Act].

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) [hereinafter Joint Explanatory Statement].

[3] According to Senator Larry Pressler, "The more open access takes hold, the less other government intervention is needed to protect competition. Open access is the principle establishing a fair method to move local phone monopolies and the oligopolistic long distance industry into full competition with one another." 141 Cong. Rec. S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler). Senator Ernest F. Hollings has said, "Competition is the best regulator of the marketplace. But until that competition exists, until the markets are opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers' disadvantage. Competitors are ready and willing to enter the new markets as soon as they are opened." *Id.* at S7984 (statement of Sen. Hollings).

[4] In some areas, increased competition has already made possible significant reductions in economic regulation. *See, e.g., Motion of AT&T Corp. to be Reclassified as a Nondominant Carrier*, Order, 11 FCC Rcd 3271 (1995), *recon. pending*; *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, FCC 96-123 CC Docket No. 96-91, (rel. March 25, 1996) (proposing to forbear from requiring tariffs for nondominant interexchange carriers).

1996 Act. Those rules should promote the competitive markets envisioned by Congress.[5] As Senator Pressler has observed, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to devise a new national policy framework -- a new regulatory paradigm for telecommunications -- which accommodates and accelerates technological change and innovation."[6] The purpose of this proceeding is to adopt rules to implement the local competition provisions of the Communications Act of 1934, as amended by the 1996 Act, particularly Section 251. These rules will establish the "new regulatory paradigm" that is essential to achieving Congress's policy goals.

3. This rulemaking is one of a number of interrelated proceedings designed to advance competition, to reduce regulation in telecommunications markets and at the same time to advance and preserve universal service to all Americans. We are especially cognizant of the interrelationship between this proceeding, our recently initiated proceeding to implement the comprehensive universal service provisions of the 1996 Act and our upcoming proceeding to reform our Part 69 access charge rules.[7] Although these proceedings will be conducted in separate dockets, and the 1996 Act prescribes different completion dates for two of the proceedings, we intend to conduct and conclude all of these proceedings in a comprehensive, consistent, and expedited fashion. We ask commenters in this proceeding to bear in mind the relationship between these parallel proceedings and to frame their proposals within the pro-competitive, deregulatory context of the 1996 Act as a whole.

A. Background

4. In contrast to the 1996 Act, the common carrier provisions of the Communications Act of 1934 were grounded in the notion that interstate telecommunications services would be offered and regulated on a monopoly basis. For decades, state legislatures also followed this traditional approach in regulating LECs' intrastate services. Local and long distance telephone monopolies were created and maintained on the grounds that the provision of telecommunications

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[5] According to Representative Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . . and from these choices, the benefits of competition flow to all of us as consumers -- new and better technologies, new applications for existing technologies, and most importantly . . . lower consumer price." 142 Cong. Rec. H1149 (Feb. 1, 1996)(statement of Rep. Fields).

[6] 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (statement of Sen. Pressler).

[7] *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 CC Docket No. 96-45, (rel. Mar. 8, 1996) (*Universal Service NPRM*) (proposing rules to implement Section 254 of the 1996 Act). This proceeding also is relevant to our price cap regulations and our regulation of the interstate, interexchange marketplace. *Price Cap Performance Review for Local Exchange Carriers*, Second Further Notice of Proposed Rulemaking, FCC 95-393 (rel. Sept. 20, 1995) (*Price Caps Second Further Notice*) (soliciting comments on proposed and other possible changes to the price cap plan to reflect emerging competition in telecommunications services); *Price Cap Performance Review for Local Exchange Carriers*, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd 13659 (1995) (*Price Caps Fourth Further Notice*) (seeking comment on issues relating to revisions of the long-term price cap plan); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, FCC 96-123 CC Docket No. 96-91 (rel. March 25, 1996) (proposing to forbear from requiring tariffs for nondominant interexchange carriers). We also plan to initiate a proceeding that will review our existing jurisdictional separations rules in the context of the new statute.

services was a natural monopoly[8] and, consequently, service could be provided at the lowest cost to the maximum number of consumers through a single regulated telecommunications network. The monopoly paradigm was thought to further goals of universal service, service quality, and reliability. The Modification of Final Judgment (MFJ) that required AT&T to divest the Bell Operating Companies (BOCs) in 1984 was not so much a repudiation as a reduction in the scope of this paradigm.[9] It reflected the judgment that the markets for interexchange services, telecommunications equipment, and information services could become competitive. At the same time, the local exchange continued to be treated as a natural monopoly that required rigorous regulatory oversight by state and federal authorities.

5. Even as the MFJ was implemented, academic criticism of the natural monopoly model for the local network was developing. During the past 12 years, many commenters and businesses have asserted that technological innovation has eroded any arguable natural monopoly in the local exchange, and that government should eliminate any legal impediments to entry. This view is now embodied in the 1996 Act. The extent to which it can be proved in the marketplace depends on the capabilities of inventors, entrepreneurs, and financiers, as well as this Commission and its state counterparts. At the time the 1996 Act was signed, 19 states had in place some rules opening local exchange markets to competition, including seven states in which competing firms had already begun to offer switched local service.[10] Even these 19 states, however, vary widely in their efforts to promote competitive entry into local markets. Moreover, as of 1996, more than 30 states had not adopted laws or regulations providing for local competition. Many of those states that had not adopted laws or regulations permitting local competition had provisions that specifically limited competitive entry into local telecommunications markets. Section 253(a) of the 1996 Act prohibits these affirmative legal barriers to entry,[11] and authorizes the Commission to preempt enforcement of such entry barriers.[12]

6. We believe that, in enacting the 1996 Act, Congress recognized that although removing legal barriers to entry is necessary, it is still not sufficient to enable competition to replace monopoly in the local exchange. Congress acknowledged that incumbent LECs have

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[8] A market is characterized as a natural monopoly if a single firm can serve the market at a lower cost than two or more firms. This result is due to one provider being able to exploit economies of scale throughout the range of output likely to be demanded by the market. *See, e.g.*, Alfred Kahn *The Economics of Regulation* Vol. II 119 (1988); *see also* Daniel Spulber *Regulation and Markets* 3 (1989).

[9] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *vacated sub nom. United States v. Western Elect. Co.*, slip op. CA 82-0192 (D.D.C. Apr. 11, 1996).

[10] The following states have competing firms offering switched local service: Massachusetts, Michigan, California, Illinois, Maryland, New York, and Washington. At least some local competition rules are in place in Virginia, North Carolina, Colorado, Louisiana, Arizona, Connecticut, Florida, Georgia, Iowa, Ohio, Oregon, and Tennessee. *See* Common Carrier Competition, CC Report No. 96-9, Federal Communications Commission, Common Carrier Bureau, Spring 1996. "Generally, new competitors are small and are still experimenting in the market." *Id.* at 3.

[11] Section 253 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 1996 Act, sec. 101 § 253(a).

[12] 1996 Act, sec. 101, § 253(d)

constructed and put in place high quality, reliable, redundant local networks that can provide virtually ubiquitous service, and that they possess an approximate 99.7 percent share of the local market as measured by revenues.[13] Because of this existing infrastructure, an incumbent LEC typically can serve a new customer at a much lower incremental cost than could a new entrant that is denied access to the incumbent LEC's facilities, and thereby is denied access to as many central office switches and as much trunking and subscriber loops as the incumbent LEC operates. Moreover, because virtually all existing customers subscribe to the incumbent LEC, a consumer of local switched service would not subscribe to a new entrant's network if the customer could not complete calls to the incumbent LEC's end users. As Congress appeared to recognize in enacting section 251, if the incumbent LEC has no obligation to interconnect and to arrange for mutual transport and termination of calls, it could effectively block or greatly retard entry into switched local service by using its economies of scale and network externalities as impediments to entry.

7. Congress expressly recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."[14] AT&T, for example, in filings before the Commission, has estimated that it would have to invest approximately $29 billion to construct new facilities in local markets in order to be able to provide full facilities to reach 20 percent of the 117 million access lines served by the BOCs.[15] Similarly, cable[16] and wireless[17] systems will require

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[13] *Telecommunications Industry Revenue: TRS Fund Workshop Data*, FCC Industry Analysis Division, Feb. 1996, Tables 14 and 15 show that LEC revenues in 1994 were $98.4 billion, while total Competitive Access Provider revenue was $287 million. Even though competitive access provider (CAP) revenues have grown to approximately $1.15 billion in 1995, they still represent a *de minimis* portion of the market. *Local Telecommunications Competition Annual 1995-96*, Connecticut Research, Glastonbury, Conn. (1995) at i-5, Table 1.3.

[14] Joint Explanatory Statement at 148.

[15] AT&T submission, Mar. 18, 1996. By contrast, AT&T's capital construction cost for 1995 was $4.96 billion. *See* Merrill Lynch, *Telecom Services-Long Distance. Fourth Quarter Review: How Much Longer Can the Equilibrium Last? The Catalyst: The Telecommunications Act of 1996*, Feb. 15, 1996 at Table 6. Since January 1994, MCI Metro has spent $500 million to deploy a total of 2,338 route miles of fiber and 11 switches in 25 cities across the country.

[16] Cable systems pass 96 percent of homes in the United States. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060 (1995) (based on a total of 91.6 million television households as of year-end 1994). The provision of telephony over cable systems, however, is largely in the experimental stages today. For example, Motorola recently announced that it will provide cable-telephony products to TCI Telephony Services, enabling TCI to begin cable-based telephony services in the Chicago area this year. Motorola Multimedia Announces Purchase Agreement with TCI, Press Release (September 21, 1995). As of October 1995, Time Warner was providing telephony to approximately 50 homes in the Rochester area. *The Big Boys Come Calling*, N.Y. Times, Oct. 19, 1995, at 1. Some other cable operators have announced plans to deploy cable-telephony systems by the end of 1996. *See* Paul Farhi, *Alexandria Cable Firm to Offer Phone Service; Company Would Compete With Bell*, Wash. Post, Feb. 17, 1996, at B1. Virtually all cable systems, however, will require significant network upgrades in order to provide telephony service, including additional deployment of fiber optic cable, additional electronics, and back-up power systems.

[17] Although wireless technologies are continuing to develop, some wireless carriers, particularly in urban areas, currently face serious capacity constraints. These will be alleviated through the conversion from analog to digital service, further advances in compression technology, and the deployment of personal communications

substantial investment before either is capable of providing a widespread substitute for wireline telephony services.

8. In the 1996 Act, Congress boldly moved to restructure the local telecommunications market so as to remove economic impediments to efficient entry that existed under the monopoly paradigm. In order to offset the economies of scale and network externalities that would inhibit efficient entry of competitors into markets currently monopolized by incumbent LECs, the 1996 Act requires those LECs to offer interconnection and network elements on an unbundled basis, and imposes a duty to establish reciprocal compensation arrangements for the transport and termination of calls.[18] As the 1996 Act further recognizes, these duties of incumbent LECs are only meaningful in conjunction with the Act's limitations on the rates that can be charged; otherwise, an incumbent LEC could offer interconnection, unbundling, and transport and termination, but at prices that perpetuate its market power.[19] To constrain the incumbent LEC's ability to perpetuate its market power through the pricing of interconnection and unbundled elements, Congress specified that the prices for such transactions should be cost-based and just and reasonable.[20] By freeing new entrants from having to build facilities that totally duplicate the LECs' networks, the 1996 Act has dramatically increased the opportunities for competitive entry and minimized the otherwise overwhelming competitive advantages of large established carriers. We also note that the new law provides for exemption, suspension, or modification of certain requirements, under certain conditions, with respect to small and rural LECs.[21]

9. Different entrants may be expected to pursue different strategies that reflect their competitive advantages in the markets they seek to target.[22] For example, interexchange carriers and competitive access providers may combine their own facilities with unbundled loops and other LEC elements and perhaps augment their own loop facilities over time. Cable systems may choose to develop more extensive networks within their service areas, and thus require fewer unbundled elements from LECs; but, like all entrants, they will require termination arrangements with incumbent LECs. Outside their franchise areas, or in areas not passed by their existing systems, cable companies will need to find some other technique for offering

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service (PCS). Huge investments to reduce cell size and increase frequency reuse may be required to give wireless systems a significant fraction of the traffic-carrying capacity of the incumbent LECs' networks. There is also currently a significant price difference between wireless and wireline service. A wireless call, for example, is typically priced at several times the price of a wireline call. Sprint Spectrum offers an introductory price for its wireless service of $15 per month, which includes access to the system, 15 minutes of air time, and $.31 per minute thereafter. *See A Beginner's Guide to the Cellular Maze*, Wash. Post, Dec. 4, 1995. In contrast, the average price paid by residential customers for local wireline service is about $.03 per minute. *See Trends in Telephone Service*, FCC Industry Analysis Division, Feb. 1995, Tables 6 and 19.

[18] 1996 Act, sec. 101, §§ 251(b)(5), (c)(2), and (c)(3).

[19] Because the ability to send and receive calls between a new entrant's customers and an incumbent LEC's customers is essential to the new entrant's viability, we believe that incumbent LECs have vastly superior bargaining power in negotiations for mutual termination.

[20] 1996 Act, sec. 101, §§ 252(d)(1), (d)(2).

[21] 1996 Act, sec. 101, § 251(f).

[22] For example, in Rochester, AT&T has entered the local market by reselling capacity on the local network, while Time Warner plans to offer local service over its cable system, which will be interconnected with the local network. *See The Big Boys Come Calling*, *supra* note 16.

telecommunications services, such as resale of incumbent LEC services or purchase of unbundled LEC elements.[23]

10. In addition to imposing interconnection, termination, and unbundling requirements in the 1996 Act, Congress also provided for entrants to be able to resell a LEC's retail services.[24] Even if an entrant planned to construct its own facilities, it may still face marketing disadvantages, because of the time it takes to construct a new network. Resale enables new entrants to offer at the outset a conventional service to all customers currently served by an incumbent LEC. Some entrants also may choose to rely on resale as part of a longer term strategy as well.

11. At the same time, Congress plainly intended for LECs in the future to be vigorous competitors, to continue to offer high quality service, and to play a vital role in delivering universal service to all Americans. Nothing in the 1996 Act suggests that Congress intended to divest incumbent LECs of all or part of their local networks, even if some portions continue to be natural monopolies. Indeed, the Act expressly confirms that incumbent LECs may earn a reasonable profit for the interconnection services and network elements they provide.[25]

12. Consistent with this perspective on competition, we also note that the purpose and, given proper implementation, the likely effect of the unbundling and other provisions of the 1996 Act is not to ensure that entry shall take place irrespective of costs, but to remove both the statutory and regulatory barriers and economic impediments that inefficiently retard entry, and to allow entry to take place where it can occur efficiently. This entry policy is competitively neutral; it is pro-competition, not pro-competitor. Our discussion of the 1996 Act in this and other proceedings, therefore, is phrased in terms of removing statutory and regulatory barriers and economic impediments, in permitting efficient competition to occur wherever possible, and replicating competitive outcomes where competition is infeasible or not yet in place.

13. This foregoing discussion has focused on obligations created by the 1996 Act for incumbent LECs in order to reduce economic impediments to efficient market entry by new competitors. The statute, however, also creates general duties for all telecommunications carriers, and obligations for all local exchange carriers, whether classified as "incumbent" LECs or not.[26] These provisions are also important to facilitating competitive local telecommunications markets. We discuss those provisions below.

B. Overview of Sections 251, 252 and 253

14. In adding new sections 251, 252, and 253 to the Communications Act of 1934, Congress set forth a blueprint for ending monopolies in local telecommunications markets. As discussed above, sections 251(b) and (c) impose specific obligations on incumbent LECs to

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[23] Because of local franchising, a given cable operator may not have cable facilities in all parts of the geographic market in which it intends to offer telecommunications service.

[24] 1996 Act, sec. 101, § 251(c)(4).

[25] 1996 Act, sec. 101, § 252(d)(1).

[26] 1996 Act, sec. 101, § 252(a), (b).

open their networks to competitors.[27] Section 251(b)(5), in particular, requires all LECs, including incumbent LECs, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[28]

15. Section 251(c) imposes on incumbent LECs three key and separate duties. They must make available to new entrants and existing competitors in local telecommunications markets interconnection, services, and unbundled network elements, and offer for resale at wholesale rates any telecommunications service that the incumbent LEC provides at retail to subscribers. Specifically, section 251(c)(2) requires an incumbent LEC to interconnect with any requesting telecommunications carrier at any technically feasible point in the LEC's network for the transmission and routing of telephone exchange service and exchange access. Section 251(c)(3) requires incumbent LECs to unbundle their network facilities and features so that an entrant can choose among them, combine them with any of its own facilities, and offer services that will compete with the incumbent's offerings. In addition, section 251(c)(4) directs an incumbent LEC to offer for resale, at a wholesale rate, any telecommunications service the incumbent LEC offers to end users at retail. Viewed as a whole, the statutory scheme of section 251(b) and (c) enables entrants to use interconnection, unbundled elements, and/or resale in the manner that the entrant determines will advance its entry strategy most effectively.[29]

16. Section 251(d)(1) directs the Commission to establish rules to implement the requirements of section 251, including the core interconnection, unbundling, and resale provisions of section 251(c). These rules, however, have much broader implications than merely implementing the requirements of section 251. In fact, these rules are central to a number of functions contemplated by the 1996 Act. As discussed below, these rules in varying ways relate to such issues as: (1) the voluntary negotiation process between incumbent LECs and telecommunications carriers; (2) the arbitration process; (3) state commission approval of arbitrated agreements; (4) the FCC's review of arbitrated agreements when a state commission fails to act; (5) judicial review of state commissions' and this Commission's actions; (6) statements of generally available terms and conditions by BOCs; (7) removal of barriers to entry; and (8) BOC entry into interLATA services.

17. Section 251(f)(1) provides that the obligations under section 251(c) shall not apply to a rural telephone company, as defined in the 1996 Act, "until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than sections (b)(7) and (c)(1)(D) thereof."[30] Section 251(f)(2) provides that a LEC "with fewer than 2 percent of the Nation's subscriber lines" may petition the state commission for a suspension or modification of the

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[27] 1996 Act, sec. 101, § 251(c). In addition, as discussed below, sections 251(a) and 251(b) impose other obligations on all telecommunications carriers and all LECs, respectively.

[28] 1996 Act, sec. 101, § 251(b)(5).

[29] Section 251(c)(2) would permit a cable operator to interconnect its facilities with an incumbent LEC's network. Section 251(c)(3) would enable a competitive access provider to combine its own switches and transport facilities with incumbent LEC loops in order to serve end users. Section 251(c)(4) would enable a new firm to enter a local market quickly and offer the incumbent LEC's subscribers resold services while the entrant constructed its local facilities.

[30] 1996 Act, sec. 101, § 251(f)(1).

requirements set forth in sections 251(b) and (c).[31]

18. Section 252 sets forth the procedures that incumbent LECs and new entrants must follow to transform the requirements of section 251 into binding contractual obligations. Under section 252, incumbent LECs and new entrants initially must seek to agree on the terms and conditions under which LEC facilities and services are made available to the new entrant. To the extent that the resulting agreements are based on voluntary negotiations rather than state arbitration, those agreements are not required to satisfy the provisions of sections 251 and our regulations issued thereunder, but such agreements must not discriminate against a telecommunications carrier not a party to the agreement, and all portions must be consistent with the public interest, convenience, and necessity.[32]

19. If an incumbent LEC and requesting carrier are unable to reach a negotiated agreement, section 252(c) authorizes a state commission to resolve disputed issues by arbitration, and requires the state commission to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." The Commission's section 251 rules also guide states in their subsequent review of arbitrated arrangements.[33] A state commission may reject an arbitrated agreement (or any portion thereof) pursuant to section 252(e)(2)(B) "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." The rules adopted in this proceeding also will guide the Commission in a similar context. In the event that the Commission must assume the responsibility of a state commission under section 252(e)(5), the section 251 rules will provide the substantive standards the Commission will apply to arbitrate and approve agreements pursuant to section 252.

20. Thus, the statutory scheme of sections 251 and 252 contemplates that the obligations imposed by section 251 and our regulations will establish the relevant provisions that will frame the negotiation process and will govern the resolution of disputes in the arbitration process. We recognize that the section 251 rules will tend to influence negotiations, pursuant to section 252(a)(1) and (2), between incumbent LECs and requesting carriers seeking interconnection, access to unbundled network elements, and resale of LEC services.[34] At least in some cases, the implementing Section 251 rules may serve as a *de facto* floor or set of minimum standards that guide the parties in the voluntary negotiation process.

21. Sections 271 and 273 create incentives for the BOCs to implement promptly the mandates of sections 251 and 252. Pursuant to section 271, a BOC may not offer interLATA services within its service area ("in region") until it is approved to do so (on a state-by-state basis) by the Commission, and section 273 allows a BOC to enter manufacturing at the same time the BOC is approved to offer in-region interLATA services.[35] One of the requirements for

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[31] 1996 Act, sec. 101, § 251(f)(2).

[32] 1996 Act, sec. 101, § 252(e)(2)(A).

[33] *See* 1996 Act, sec. 101, § 252(e)(2).

[34] As a practical matter, it seems reasonable to expect that requesting carriers will seek to negotiate terms and conditions that are, overall, at least as advantageous as those available pursuant to the Commission's rules.

[35] Under the terms of the MFJ, the BOCs were barred from manufacturing telecommunications equipment. Section 273 of the 1996 Act repealed that judicial prohibition and allows BOCS to manufacture such equipment subject to certain conditions.

obtaining approval for in-region interLATA services under section 271 is that the BOC must produce either an interconnection agreement that, among other things, has been approved under section 252 or, under certain circumstances, a statement of generally available interconnection terms and conditions. Under section 252, interconnection agreements that are arbitrated have to comply with section 251's mandates, as do all BOC statements of generally available terms. In addition, all agreements and statements must comply with a "competitive checklist" set out in section 271, several requirements of which expressly reference the mandates of section 251.[36] In these respects, compliance with section 251 and our regulations thereunder is a prerequisite to BOC entry into in-region interLATA services. But compliance may also facilitate BOC entry under section 271 in less obvious ways. For example, in reviewing a BOC application, the Commission must also consult with the Department of Justice and the relevant state commission, and it must decide whether granting the application serves the public interest. Each of these consultations and determinations could, in theory, be affected by considerations of the extent to which the BOC is regarded as complying with section 251 and our rules. Thus, the Commission's section 251 rules will play a central role regarding BOC entry into in-region interLATA services under section 271.

22. Section 253 bars state and local regulations that prohibit or have the effect of prohibiting entities from offering telecommunications services.[37] It also authorizes the Commission to preempt any law or regulation that is violative of this section.[38] The section 251 rules should help to give content and meaning to what state or local requirements the Commission "shall preempt" as barriers to entry pursuant to section 253.

23. Moreover, the section 251 rules will assist the judiciary in reviewing actions of state commissions and the Commission in this area. Subsection 252(e)(6) provides that any party aggrieved by a state determination regarding a negotiated or arbitrated agreement or a statement of generally available terms may bring an action in federal district court "to determine whether the agreement or statement meets the requirements of section 251," presumably including our rules thereunder. The federal district court will thus have to refer to our implementing regulations in determining whether a state commission acted properly in approving or rejecting an arbitrated agreement. Similarly, Commission action in this area will be subject to review by federal circuit courts of appeal. This might include, for example, review of Commission decisions regarding BOC petitions to provide interLATA services pursuant to section 271 or review of Commission action preempting state or local regulations pursuant to section 253. In all of these cases, the court will look to the Commission's section 251 rules to guide its review of the Commission's action.

24. These statutory provisions and the Commission's rules implementing the requirements of section 251 are designed to end the era of monopoly regulation for American telecommunications markets. By dismantling entry barriers and reducing the inherent advantages of incumbent LECs, they establish a national process for enhancing competition, increasing consumer choice, lowering rates, and reducing regulation. The Commission's rules implementing section 251 will have a pervasive and substantial impact in a variety of contexts under the 1996 Act and will serve as the cornerstone of the pro-competitive provisions of the statute. These rules will assist incumbent LECs, telecommunications carriers, state commissions, the FCC, and the courts in defining rights and responsibilities regarding interconnection,

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[36] 1996 Act, sec. 101, § 271(c)(2)(B).

[37] 1996 Act, sec. 101, § 253(a).

[38] 1996 Act, sec. 101, § 253(d).

unbundling, resale, and many other issues under the 1996 Act.

II. PROVISIONS OF SECTION 251

A. Scope of the Commission's Regulations

25. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, August 8, 1996), to "establish regulations to implement the requirements of [section 251]."[39] The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[40] In addition to directing the Commission to establish rules to implement section 251, section 253 further requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[41]

26. These specific statutory directives make clear that Congress intended the Commission to implement a pro-competitive, de-regulatory, national policy framework envisioned by the 1996 Act.[42] Given the forward-looking focus of the 1996 Act, the nationwide character of development and deployment of underlying telecommunications technology, and the nationwide nature of competitive markets and entry strategies in the dynamic telecommunications industry, we believe we should take a proactive role in implementing Congress's objectives. Thus, we intend in this proceeding to adopt national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states that is compatible with the terms and the pro-competitive intent of the 1996 Act.

27. In accomplishing this objective, we need to determine the extent to which our rules should elaborate on the meaning of the statutory requirements set forth in sections 251 and 252. For example, we could adopt explicit rules to address those issues that are most critical to the successful development of competition, and with respect to which significant variations would undermine competition. This approach would further a uniform, pro-competitive national policy framework, as envisioned by the statute, and yet still preserve broad discretion for states to resolve, consistent with the 1996 Act, the panoply of other individual issues that may be raised in arbitration proceedings. This approach also would facilitate rapid private sector deployment of advanced telecommunications and information technologies and services by swiftly opening all telecommunications markets to competition. We seek comment on such an approach and whether it would accomplish Congress's goal of promoting efficient competition in local telecommunications markets throughout the country.

28. We see many benefits in adopting such rules to implement section 251. Such rules should minimize variations among states in implementing Congress's national telecommunications policy and guide states that have not yet adopted the competitive paradigm of the 1996 Act. Such rules also could expedite the transition to competition, particularly in

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[39] 1996 Act, sec. 101, § 251(d)(1).

[40] Joint Explanatory Statement at 1.

[41] 1996 Act, sec. 101, § 253.

[42] Joint Explanatory Statement at 1.

those states that have not adopted rules allowing local competition, and thereby promote economic growth in state, regional, and national markets.[43]

29. The adoption of explicit national rules to implement section 251 would not necessarily undermine the initiatives undertaken by various states prior to the enactment of the 1996 Act, and in fact, we anticipate that we will build upon actions some states have taken to address interconnection and other issues related to opening local markets to competition. Some states have been in the forefront of the pro-competitive effort to open local markets to competition, and these approaches may comport with the 1996 Act despite the fact that many of them pre-date it. Building on the progress made by these states, explicit national rules could be modelled on existing state statutes or regulations to the extent that they comply with the terms of the 1996 Act. For example, the Commission could conclude that a particular state's approach to unbundling of network elements is consistent with the 1996 Act and that it therefore may serve as a useful model for a national rule on unbundling. The Commission might also conclude that a range of different approaches used by several states to interconnection arrangements comply with the Act and therefore would be acceptable under a national rule. Throughout this item, we seek comment on the extent to which existing state initiatives are consistent with the new federal statute and, to the extent they are, the wisdom of using existing state approaches as guideposts or benchmarks for our national rules.

30. Explicit national rules implementing section 251 can be expected to reduce the capital costs of, and attract investment in, new entrants by enhancing the ability of the investment community to assess an entrant's business plan. Such rules would also permit firms to configure their networks in the same manner in every market they seek to enter. Uniform network configurations could achieve significant cost efficiencies for new entrants; if new competitors were required to modify their networks in different markets solely to be compatible with a patchwork of different regulations, they would likely incur additional expense, thereby increasing the cost of entry, a result that would be inconsistent with the pro-competitive goals of the statute.[44]

31. Explicit national rules under section 251 also could expedite the implementation of other provisions of the 1996 Act that require incumbent LECs, new entrants, the states, federal courts, and the Commission to apply the requirements of section 251 in other contexts. Section 252 provides that incumbent LECs and entrants initially will seek to arrive at interconnection and unbundling arrangements through voluntary negotiations. By narrowing the range of permissible results, concrete national standards would limit the effect of the incumbent's bargaining position on the outcome of the negotiations. In addition, the application of explicit national rules under section 251 could provide important guidance to federal district courts that are charged with reviewing state determinations of whether particular arbitration agreements are consistent with section 251 (presumably including our rules thereunder). Moreover, the absence of such rules could lead to varying or inconsistent decisions by individual district and circuit courts concerning the core requirements of the 1996 Act. We believe that such a result would be inconsistent with the intent of Congress in passing comprehensive telecommunications legislation.

32. Further, rules that elaborate on the statutory requirements of section 251 would

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[43] More than 30 states do not have rules governing local competition in place today; most of those states have not commenced proceedings to adopt the necessary rules.

[44] A uniform network design can be expected to reduce start-up costs, accelerate innovation, enhance interoperability of networks and equipment, and reduce the administrative burdens for both incumbent LECs and entrants.

establish clear guidelines that we will need to carry out our responsibilities under the 1996 Act. We will need explicit rules to guide our arbitration of disputes between incumbent LECs and new entrants if we are required, under section 252(e), to assume those responsibilities. In addition, BOCs must satisfy the checklist set forth in section 271(c)(2)(B) before they may offer in-region, interLATA services. The checklist requires BOCs to comply with specific provisions of section 251. Thus, the Commission needs to articulate clear rules that clarify what constitutes compliance with section 251 for purposes of our review under section 271.

33. On the other hand, there may be countervailing concerns that could weigh against rules that significantly explicate in some detail the statutory requirements of sections 251 and 252. Adopting explicit national rules, in certain circumstances, might unduly constrain the ability of states to address unique policy concerns that might exist within their jurisdictions. The case for permitting material variability among the states could be strengthened if there are substantial state-specific variations in technological, geographic, or demographic conditions in particular local markets that call for fundamentally different regulatory approaches. We seek comment on the nature of such variations, and on whether there are such variations that require fundamentally different regulatory approaches. States may also seek, to the extent permitted by sections 251, 252, 253, and 254, to ensure the uninterrupted delivery of certain services by the incumbent where competition might arguably threaten those services. It might also be argued that there is value to permitting states to experiment with different pro-competitive regimes to the extent that there is not a sufficient body of evidence upon which to choose the optimal pro-competitive policy. If we were to decline to adopt explicit rules at all, in effect we would be permitting states to set different priorities and timetables for requiring incumbent LECs to offer interconnection and unbundled network elements. Such an approach means that we would balance the need to swiftly introduce telecommunications competition against other policy priorities. We seek comment on these issues.

34. We also note that, under section 252, states must implement any rules we establish under section 251. Section 252 assigns to the states the responsibility for arbitrating disputes between the parties, including resolving factual disputes. We seek comment on how our national rules can best be crafted to assist the states in carrying out this responsibility.

35. In the succeeding sections of this Notice, we invite parties to comment, with respect to each of the obligations imposed by section 251, on the extent to which adoption of explicit national rules would be the most constructive approach to furthering Congress' pro-competitive, deregulatory goals of making local telecommunications markets effectively competitive. We seek comment on the relative costs and benefits of constraining or encouraging variations among the states in carrying out their responsibilities under section 252. We also invite parties to comment on whether our rules implementing section 251 can be crafted to allow states to implement policies reflecting unique concerns present in the respective states, without vitiating the intended effects of a scheme of overarching national rules. We further ask parties to comment on the consequences of fostering or constraining variability among the states.

36. As a separate matter, we note that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions, as well as arrangements arrived at through compulsory arbitration pursuant to section 252(b).[45] We tentatively conclude that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply. We believe that this is consistent with both the language and the purpose of the 1996 Act. We seek comment on this tentative conclusion.

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[45] 1996 Act, sec. 101, §§ 252(b), (f).

37. On a separate jurisdictional issue, we tentatively conclude that Congress intended sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service, and network elements, and thus that our regulations implementing these provisions apply to both aspects as well. It would make little sense, in terms of economics, technology, or jurisdiction, to distinguish between interstate and intrastate components for purposes of sections 251 and 252. Indeed, if the requirements of sections 251 and 252 regarding interconnection, and our regulations thereunder, applied only to interstate interconnection, as might be argued in light of the lack of a specific reference to intrastate service in those sections, states would be free, for example, to establish disparate guidelines for intrastate interconnection with no guidance from the 1996 Act. We believe that such a result would be inconsistent with Congress' desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. As Senator Lott observed, "In addressing *local* and long distance issues, creating an open access and sound interconnection policy was the key objective . . . ."[46] Representative Markey noted that, "[W]e take down the barriers of *local* and long distance and cable company, satellite, computer, software entry into any business they want to get in."[47]

38. We also tentatively conclude that it would be inconsistent with the 1996 Act to read into sections 251 and 252 an unexpressed distinction by assuming that the FCC's role is to establish rules for interstate aspects of interconnection and the states' role is to arbitrate and approve intrastate aspects of interconnection agreements. Because the statute explicitly contemplates that the states are to follow the Commission's rules, and because the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its section 252 responsibilities, we believe that the jurisdictional role of each must be parallel. We seek comment on our tentative conclusion. The argument has also been raised that sections 251 and 252 apply *only* with respect to intrastate aspects of interconnection, service, and network elements. We seek comment on this argument as well.

39. Section 2(b) of the 1934 Act does not require a contrary tentative conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[48] As stated above, however, we tentatively conclude that section 251 applies to certain "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." In enacting section 251 after section 2(b) and squarely addressing therein the issues before us, we believe Congress intended for section 251 to take precedence over any contrary implications based on section 2(b). We seek comment on this tentative conclusion.

40. We note that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority. Indeed, that section 251 does not disturb state authority over local end user rates may explain why Congress saw no need to amend section 2(b) expressly, whereas it did see such a need in its 1993 legislation establishing commercial mobile

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[46] 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

[47] 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added)

[48] 47 U.S.C. § 152(b).

radio service (CMRS).[49] In the 1993 legislation, Congress eliminated the authority of states to regulate the rates charged for CMRS and so may have felt that an express amendment to section 2(b) would be especially helpful. We seek comment on these issues as well.

41. We also seek comment on the relationship between sections 251 and 252 and the Commission's existing enforcement authority under section 208. Section 208 of the Act gives the Commission general authority over complaints regarding acts by "any common carrier subject to this Act, in contravention of the provisions thereof."[50] Does this mean that the Commission has authority over complaints alleging violations of requirements set forth in sections 251 or 252? If not, in what forum would such complaints be reviewed? In state commissions? In courts? Is there a relevant distinction here between complaints concerning the formation of interconnection agreements and complaints regarding implementation of such agreements? We also seek comment on the relationship between sections 251 and 252 and any other source of Commission enforcement authority that may be applicable. We further seek comment on how we might increase the effectiveness of the enforcement mechanisms available under the 1934 Act, as amended. We seek comment on how private rights of action might be used under sections 206-208 of the 1934 Act, as amended, and the different roles the Commission might play, for example, as an expert agency, to speed resolution of disputes in other forums used by private parties.

B. Obligations Imposed by Section 251(c) on "Incumbent LECs"

42. We now turn to the particular provisions of section 251 that the Commission is obligated to implement under section 251(d)(1). We begin with section 251(c) because we believe that provision is the cornerstone of Congress's plan for opening local telecommunication markets to competitive entry.

43. Section 251(c) establishes obligations for "incumbent local exchange carriers."[51] An "incumbent local exchange carrier" for a particular area is defined in section 251(h)(1) as a LEC that: (1) as of the enactment date of the 1996 Act, both "provided telephone exchange service in such area" and "was deemed to be a member of the exchange carrier association pursuant to Section 69.601 of the Commission's regulations," or (2) "is a person or entity" that, on or after the enactment date of the 1996 Act, "became a successor or assign of a member" of the exchange carrier association.[52]

44. In addition, under Section 251(h)(2), the Commission may, by rule, treat another LEC or class of LECs as an incumbent LEC if (1) "such carrier occupies a position in the market for telephone exchange service within an area that is comparable" to that of an incumbent LEC, (2) "such carrier has substantially replaced" an incumbent LEC, and (3) "such treatment is consistent with the public interest, convenience, and necessity and the purposes" of Section 251.[53] We seek comment on whether we should establish at this time standards and procedures by

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[49] 47 U.S.C. § 332(c).

[50] 47 U.S.C. § 208(a).

[51] Incumbent local exchange carriers also have obligations under sections 251(a) and (b), as discussed *infra*, at Sections II.C. and D.

[52] 1996 Act, sec. 101, § 251(h)(1).

[53] 1996 Act, sec. 101, § 251(h)(2).

which carriers or other interested parties could seek to demonstrate that a particular LEC should be treated as an incumbent LEC pursuant to Section 251(h)(2).

45. We further seek comment on whether state commissions are permitted to impose on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs. We understand that some states have found that the negotiation process between incumbent LECs and their potential competitors may move more smoothly if the arrangements offered by an incumbent LEC are made reciprocal. Under this approach, for example, a potential competitor would be required to make available to an incumbent LEC directory assistance information on the same basis that the LEC agreed to furnish the information. Some parties have alleged, however, that imposing on new entrants the obligations imposed on incumbent LECs would undermine the competitive goals of the 1996 Act.[54] We seek comment on whether imposing on new entrants requirements that the 1996 Act imposes on incumbent LECs would be consistent with the Act's distinction between the obligations of all telecommunications carriers, all LECs and the additional obligations of all incumbent LECs.

1. Duty to Negotiate in Good Faith

46. As noted in section I.B., above, if the parties fail to negotiate an agreement voluntarily, they must submit to arbitration.[55] Section 251(c)(1) states that "each incumbent local exchange carrier has the . . . duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties" described in section 251(b) for LECs and section 251(c) for incumbent LECs.[56] In addition, section 252(b)(5) provides that, pursuant to the arbitration process, the refusal of a party to "participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence of, or with the assistance of, the State commission shall be considered a failure to negotiate in good faith."[57] The state commission is required to resolve, within 9 months after the incumbent LEC receives a request under section 252, any issues that were submitted for arbitration.[58]

47. We seek comment on the extent to which the Commission should establish national guidelines regarding good faith negotiation under section 251(c)(1), and on what the content of those rules should be. We note that carriers have submitted some information alleging that LECs already have employed certain tactics that the Commission should determine violate the duty to negotiate in good faith.[59] For example, carriers have alleged that incumbent LECs have refused to begin to negotiate until the requesting telecommunications carrier satisfies certain conditions,

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[54] Letter from Daniel L. Brenner, Vice President for Law and Regulatory Policy, National Cable Television Association, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (Apr. 15, 1996).

[55] 1996 Act, sec. 101, § 252(b).

[56] 1996 Act, sec. 101, § 251(c)(1).

[57] 1996 Act, sec. 101, § 252(b)(5).

[58] 1996 Act, sec. 101, § 252(b)(4)(C).

[59] *See, e.g., Implementing Local Competition Under the Telecommunications Act of 1996, A Proposed Handbook for the FCC*, Association for Telecommunications Services (ALTS), March 1996 (ALTS Handbook) at 10. *See also* Letter from Richard J. Metzger, general counsel, ALTS, to Reed E. Hundt, Chairman, FCC (Mar. 25, 1996).

such as signing a nondisclosure agreement, or agreeing to limit its legal remedies in the event that negotiations fail. We believe that such tactics might impede the development of local competition, and may be inconsistent with provisions of the 1996 Act.[60] We seek comment on the extent to which these or other practices should be deemed to violate the duty to negotiate in good faith. We note that courts and the Commission previously have addressed issues regarding good faith negotiation.[61] We seek comment on specific legal precedent regarding the duty to negotiate in good faith that we should rely on in establishing national guidelines regarding section 251(c)(1).

48. A related issue is what effect section 252 has on agreements regarding service, interconnection, or unbundled network elements that predate the 1996 Act. Section 252(e)(1) states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Section 252(a)(1) states that an agreement for interconnection, service, or network element, "including any interconnection agreement negotiated before the date of the enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section."[62] We seek comment on whether these provisions require parties that have existing agreements to submit those agreements to state commissions for approval.[63] We also seek comment on whether one party to an existing agreement may compel renegotiation (and arbitration) in accordance with the procedures set forth in section 252.

2. Interconnection, Collocation, and Unbundled Elements

a. Interconnection

49. Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[64] Such interconnection must be: (1) provided by the incumbent LEC at "any technically feasible point within [its] network;"[65] (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection;"[66] and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the

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[60] *See e.g.*, 1996 Act, sec. 101, §§ 252(h), (i).

[61] *See e.g., Southern Pacific Communications Co. v. American Tel. & Tel.*, 556 F.Supp. 825 (D.D.C. 1983).

[62] 1996 Act, sec. 101, § 252(a)(1).

[63] ALTS argues that preexisting interconnection agreements between BOCs and independent, incumbent LECs must be submitted to state agencies for approval and that the terms of those agreements must be made generally available pursuant to section 252(a)(1), (e) and (i). ALTS Handbook at 24. *See also* Letter from Richard J. Metzger, General Counsel, ALTS, to Craig A. Glazer, Chairman, Ohio Public Utilities Commission (April 1, 1996). *See also* Letter from Gary R. Lytle, Vice President, Federal Relations, Ameritech, to Reed E. Hundt (April 12, 1996) (responding to the April 1 letter from ALTS).

[64] 1996 Act, sec. 101, § 251(c)(2)(A).

[65] 1996 Act, sec. 101, § 251(c)(2)(B).

[66] 1996 Act, sec. 101, § 251(c)(2)(C).

agreement and the requirements of this section and section 252."[67] The interconnection obligation plays a vital role in promoting competition by ensuring that a requesting carrier can on reasonable rates, terms and conditions transmit telecommunications traffic between its network and the incumbent's network in a reliable and efficient manner.[68]

50. We believe that uniform national rules for evaluating interconnection arrangements would likely offer several advantages in advancing Congress's desire to create a pro-competitive national policy framework regarding local telephone service. For example, national standards would likely speed the negotiation process by eliminating potential areas of dispute. We note that, in the past, disputes before the FCC between LECs and interconnectors have arisen most often where our rules lacked specificity, or where no standards had been adopted.[69] Lingering disputes over the terms and conditions of interconnection due to confusion or ambiguity create the potential for incumbent LECs to delay entry. For these reasons we tentatively conclude that uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements.

51. We also, however, seek comment on the consequences of not establishing such specific rules for interconnection. We seek comment on whether there are instances wherein the aims of the 1996 Act would be better achieved by permitting states to experiment with different approaches. Would permitting substantial variation make it easier for states to respond more appropriately to technical, demographic, or geographic issues specific to that state or region without detracting from the overall purposes of the 1996 Act? For example, might technical differences, such as a lack of digital switching capability in a particular network, affect the technically feasible interconnection points on the network? Would variations in technical requirements among states affect the ability of new entrants to plan and configure regional or national networks? For example, how would variations in the definition of "technical feasibility," the number of required points of interconnection, and methods of interconnection, affect the ability of new entrants to plan and configure regional or national networks? How would such variations affect the entrant's ability to deploy alternative network architectures, such as synchronous optical network (SONET) rings, which may deliver telephone service more efficiently? Would a lack of explicit national standards reduce predictability and certainty, and thereby slow down the development of competition? Would a lack of explicit guidelines impair the state's ability to complete arbitration within 9 months of the date that the interconnection request was made, or our ability to evaluate BOC compliance under section 271 within 90 days? Would a lack of clear national standards impair our ability under section 252(e) to assume a state commission's responsibilities if the state commission fails to act to carry out its responsibilities under section 252?

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[67] 1996 Act, sec. 101, § 251(c)(2)(D).

[68] Senator Burns has stated that the "rules on interconnection will empower competitors by ensuring that they can gain access on fair and reasonable terms to existing local telephone facilities . . ." 142 Cong. Rec. S687-01 (Feb. 1, 1996). Senator Pressler has explained that "Interconnection . . . will put new competitors . . . on the same footing with former monopolies." 141 Cong. Rec. S8188 (June 12, 1995).

[69] *See, e.g., Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, Order Designating Issues for Investigation, 8 FCC Rcd 6909 (1993) (*Special Access Physical Collocation Designation Order*); *Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, Phase II, Order Designating Issues for Investigation, 10 FCC Rcd 11116 (1995) (*Virtual Collocation Designation Order*).

52. We also encourage parties to submit information regarding the approaches taken by those states that have allowed interconnection.[70] A number of states already have adopted a variety of approaches to interconnection.[71] For example, New York sets basic "expectations" that constitute default provisions if the parties fail to agree. These provisions include the availability of two-way trunking facilities and combined trunking arrangements.[72] California has adopted what it calls a "preferred outcomes" approach. Under this approach, parties are encouraged to use 13 broad criteria regarding interconnection arrangements (the "preferred outcomes") that were established by the State commission to guide the negotiation and arbitration process. Although parties may develop different outcomes, preferred outcomes receive expedited review and approval. Arbitration judges may also use the preferred outcomes as guidelines in cases where the negotiations fail, and they have the discretion to mandate interconnection provisions that go beyond the preferred outcomes.[73] With respect to each of the issues discussed below, we invite commenters to analyze the advantages and the disadvantages of the approaches states have adopted with respect to interconnection arrangements. We also seek comment on whether any elements of these state approaches would be suitable for incorporation into national standards implementing the 1996 Act. Finally, we ask commenting parties to identify state approaches to interconnection that they believe are inconsistent with or preempted by the 1996 Act, or that are inadvisable from a policy perspective.

53. We further seek comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under 251(c)(2) and the obligation of the incumbent LEC, and all LECs, to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications pursuant to 251(b)(5). The issue is significant mainly because, in section 252(d)(2), there is one pricing standard for "interconnection" under section 251(c)(2) and a separate one for "transport and termination" under 251(b)(5).

54. On the one hand, the term "interconnection," as used in section 251(c)(2), might refer only to the facilities and equipment physically linking two networks and not to transport and termination services provided by such linking -- in which case there is no overlap in the coverage of the two sections. On the other hand, the term "interconnection" as used in section 251(c)(2) might refer to both the physical linking of the two networks *and* to transport and termination services -- in which case there is considerable overlap. We seek comment on how to "interpret" the term "interconnection" in section 251(c)(2). Parties that advocate the broader meaning should also comment on the overlap in the coverage of the sections and how the overlap affects which section 252(d) pricing standards apply.

55. In the following paragraphs, we discuss the requirements of the 1996 Act concerning interconnection in more detail. More specifically, we address issues of technically feasible points of interconnection, just, reasonable, and nondiscriminatory terms and conditions, and quality and

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[70] We note again that, although some states have implemented detailed interconnection rules, most states either have instituted only general guidelines, or have no interconnection rules at all. A number of states have not yet certified any new entrants to provide competitive local telecommunications services.

[71] Examples of various state substantive rules regarding different aspects of interconnection are discussed in more detail below.

[72] *See Order Instituting Framework for Carrier Interconnection*, Case 94-C-0095, (N.Y. Pub. Serv. Comm'n Sept. 27, 1995) (*NYPSC Interconnection Order*).

[73] *See Competition for Local Exchange Service*, Order, Decision 95-12-056 (Cal. Pub. Util. Comm'n Dec. 20. 1995).

methods of interconnection.

(1) Technically Feasible Points of Interconnection

56. Subsection (c)(2)(B) requires that incumbent LECs provide interconnection "at any technically feasible point within the [incumbent LEC's] network."[74] We seek comment on what constitutes a "technically feasible point" within the incumbent LEC's network for purposes of this section. In this regard, we note that network technology continues to advance and emphasize that we seek to avoid a static definition that may artificially limit future interconnection. Is there a definition of "technically feasible" that will provide the necessary flexibility in determining interconnection points as network technology evolves? Further, to what extent, if any, should a risk to network reliability or other potential harm to the network be considered in determining whether interconnection at a particular point is technically feasible? We tentatively conclude that, if risks to network reliability are considered in determining whether interconnection at a certain point is technically feasible, the party alleging harm to the network will be required to present detailed information to support such a claim. We seek comment on these issues and our tentative conclusion concerning claims of network harm.

57. We also tentatively conclude that the minimum federal standard should provide that interconnection at a particular point will be considered technically feasible within the meaning of section 251(c)(2) if an incumbent LEC currently provides, or has provided in the past, interconnection to any other carrier at that point, and that all incumbent LECs that employ similar network technology should be required to make interconnection at such points available to requesting carriers. For example, many LECs already provide interconnection at the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and signal transfer points.[75] We thus tentatively conclude that interconnection at those points should be technically feasible for all incumbent LECs that use technology similar to that used by LECs currently offering interconnection at those points. We believe that as technology advances, the number of points at which interconnection is feasible may change and acknowledge that the federal standard for minimum interconnection points should change accordingly.

58. Alternatively, we could allow states to determine whether interconnection at a greater number of points would also be technically feasible. We seek comment on whether allowing states to designate additional technically feasible interconnection points would make it more difficult for a carrier to develop a regional or national network. In this regard, commenters should address additional points at which LECs currently provide interconnection and on other possible points of interconnection that may be technically feasible. Because the statute imposes an affirmative obligation on incumbent LECs to provide interconnection at any technically feasible points in their networks, we further tentatively conclude that, where a dispute arises, the incumbent LEC has the burden of demonstrating that interconnection at a particular point is technically infeasible. We seek comment on this tentative conclusion.

59. We also invite parties to submit information concerning interconnection obligations and policies that state commissions have adopted for incumbent LECs to help us determine what points of interconnection states have found to be technically feasible. We note, for example, that the New York Public Service Commission (NYPSC) has established options for interconnection

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[74] 1996 Act, sec. 101, § 251(c)(2)(B).

[75] We also note that the Illinois Commission has ordered LECs to make available interconnection at subloop points. *See Adoption of Rules on Line-side Interconnection and Reciprocal Interconnection*, Interim Order, No. 94-0049 (Ill. Comm. Comm'n April 7, 1995).

points that range from the incumbent LEC's premises to the requesting carrier's premises, and include any point in between. These options are deemed reasonable by the NYPSC, although they are not requirements (in contrast to other interconnection requirements, which New York sets up as default provisions). The parties are to negotiate the actual interconnection points, however.[76] We also seek comment on approaches that other states have adopted for determining the technical feasibility of interconnection at particular points. We also seek comment on which state policies are either inconsistent with the language of the 1996 Act or unwarranted from a policy perspective.

(2) Just, Reasonable, and Nondiscriminatory Interconnection

60. Section 251(c)(2)(D) requires that the interconnection provided by the incumbent LEC be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[77] We address the pricing of interconnection, collocation, and unbundled elements in section II.B.2.d below.

61. We seek comment on how to determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory. For example, should we adopt explicit national standards for the terms and conditions for interconnection? In particular, we seek comment on whether we should adopt uniform national guidelines governing installation, maintenance, and repair of the incumbent LEC's portion of interconnection facilities. We also seek comment on whether we should adopt standards for the terms and conditions concerning the payment of the non-recurring costs associated with installation.[78] We seek comment on whether the Commission should establish incentives to encourage incumbent LECs to provide just, reasonable, and nondiscriminatory interconnection and, if so, what those incentives should be. For example, should LECs be required to meet agreed upon performance standards for installing or repairing interconnection facilities and pay liquidated damages for any failure to satisfy the agreement?[79] Are there means of accomplishing this result that do not require the propagation of rules detailing specific performance standards?

62. If we were to establish national guidelines on this issue, we seek comment on state policies regarding the terms and conditions for interconnection that might serve as models. For example, with respect to meet point interconnection arrangements,[80] the state of Washington requires that each company pay for and be responsible for building and maintaining its own facilities up to the meet point, as is typical in this type of interconnection arrangement.[81] We note that New York permits earnest fees on interconnection arrangements to ensure the good

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[76] *See NYPSC Interconnection Order.*

[77] 1996 Act, sec. 101, § 251(c)(2)(D).

[78] ALTS Handbook at 18.

[79] *See generally* Implementing the Telecommunications Act of 1996: Encouraging Local Exchange Competition, TCG, Apr. 4, 1996 (*TCG Submission*).

[80] A meet point is a point, designated by two carriers, at which one carrier's responsibility for service begins and the other's ends. A meet point interconnection arrangement requires each carrier to build and maintain its network to the meet point. Each carrier also pays its share of the cost of the interconnection arrangement.

[81] Washington Utilities and Transportation Commission. Fourth Supplemental Order, Docket UT-941464 *et al.* (Oct. 1995) (*Washington State Order*).

faith nature of interconnection requests before the incumbent LEC begins construction or other necessary arrangements for interconnection. That fee is then applied to the requesting party's costs for interconnection.[82] We recognize, however, that LECs potentially could use such fees and other terms and conditions to delay and deter entry. We invite parties to comment on this approach as well as on other states' policies. We specifically seek comment on whether such policies are consistent with the pro-competitive and deregulatory tenor of the Act. We seek comment on whether any state substantive rules regarding the terms and conditions for interconnection might be adopted as a national standard, as well as comment on which state rules might be inconsistent with the 1996 Act.

(3) Interconnection that is Equal in Quality

63. Section 251(c)(2)(C) requires that the interconnection provided by the incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[83] We seek comment on what criteria may be appropriate in determining whether interconnection is "equal in quality." We seek comment on whether these criteria should be adopted as a national standard, or whether competitive objectives would be achievable by allowing variations and experimentation among states. We also seek comment on relevant state requirements, such as those in Iowa, which prohibit a rate-regulated incumbent from providing inferior interconnection to another provider.[84] We invite parties to comment on this and other provisions that might guide our efforts in implementing the "equal in quality" requirement of the 1996 Act.

(4) Relationship Between Interconnection and Other Obligations Under the 1996 Act

64. Section 251(c)(2) further requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier." In comparison, section 251(c)(6) imposes upon incumbent LECs "the duty to provide . . . for physical collocation of equipment necessary for interconnection."[85] We note that section 251(c)(6) regarding physical collocation does not expressly limit the Commission's authority under section 251(c)(2) to establish rules requiring incumbent LECs to make available a variety of technically feasible methods for interconnection. These methods may, for example, include meet point arrangement as well as physical and virtual collocation. We tentatively conclude that the Commission has the authority to require, in addition to physical collocation, virtual collocation and meet point interconnection arrangements, as well as any other reasonable method of interconnection. We seek comment on this tentative conclusion.

65. We seek comment on the various state requirements concerning methods for interconnection. For example, in the state of Washington, the commission has ordered that companies establish mutually agreed upon meet points for purposes of exchanging local traffic. Incumbent LECs may establish, through negotiations, separate meet points for each company, or

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[82] *See* New York Optical Transport Service Tariff, No. 913 (1992).

[83] 1996 Act, sec. 101, § 251(c)(2)(C).

[84] Iowa Code, § 476.101(2).

[85] 1996 Act, sec. 101, § 251(c)(6).

a common hub by which multiple companies can come together efficiently.[86] Oregon requires that requesting carriers be permitted to interconnect with incumbent LECs by negotiating mutually acceptable arrangements, including meet points.[87] Maryland allows the incumbent LEC the option of using virtual or physical collocation, subject to commission review.[88] We seek information on these and other similar state requirements. We seek comment on whether any state requirements concerning methods for interconnection might be appropriately adopted as a national standard. We also seek comment concerning those state requirements that may be inconsistent with the 1996 Act or inappropriate from a policy standpoint.

b. Collocation

66. Section 251(c)(6) of the Act requires incumbent LECs to provide "for the physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[89] Section 251(c)(6) fosters competition by ensuring that a competitor may install equipment necessary for interconnection or access to unbundled network elements on LEC premises and gives competitors access to the LEC central office to install, maintain, and repair this equipment.

67. The establishment of national rules with respect to at least some issues regarding collocation would appear to offer several important benefits. For example, we believe that national standards would speed the negotiation process by eliminating potential areas of dispute. Lingering disputes or ambiguity regarding the parties' obligations may delay competitive entry. In addition, uniform standards would probably facilitate entry by competitors in multiple states by removing the need to comply with a patchwork of state variations in technical and procedural requirements. Finally, clear uniform rules could add speed, fairness, and simplicity to the arbitration process, and reduce uncertainty. We also note that beginning in 1992, the Commission adopted both physical and virtual collocation rules and that these rules were then used by several states to develop their own approaches to collocation.[90] We therefore tentatively conclude that we should adopt national standards where appropriate to implement the collocation requirements of the 1996 Act.

68. We also seek comment on the extent to which we should establish national rules for collocation that allow for some variation among states, and on the advantages and disadvantages of permitting such variation. Would permitting material variation foster competition and make it

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[86] *Washington State Order*.

[87] *Applications for Certificate of Authorization to Provide Telecommunications Service in Oregon*, Order No. 96-021 (Oregon Pub. Util. Comm'n Jan. 12, 1996).

[88] *Chesapeake & Potomac Telephone Company of Maryland*, Order No. 70357 in Case No. 8533, (Md. Pub. Serv. Comm'n Feb. 11, 1993).

[89] 1996 Act, sec. 101, § 251(c)(6).

[90] *Expanded Interconnection With Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*); *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Expanded Interconnection With Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5166, ¶¶ 31-32 (1994)(*Virtual Collocation Expanded Interconnection Order*); *Virtual Collocation Designation Order*, 10 FCC Rcd 11116.

easier for states to respond more appropriately to issues specific to that state or region? Would variations in technical requirements among states affect the ability of new entrants to plan and configure regional or national networks? Would a lack of specific national standards reduce predictability and certainty, and thereby slow down the development of competition? Would a lack of explicit guidelines impair the state's ability to complete arbitration within 9 months of the date that the interconnection request was made, or our ability to evaluate BOC compliance under section 271 within the statutory time-frame? Would a lack of specific national standards impair our ability under section 252(e) to assume a state commission's responsibilities if the state commission fails to act to carry out its responsibilities under section 252?

69. We also encourage parties to submit information concerning specific state approaches regarding collocation that might provide useful models for national guidelines. In several states, including California and New York, incumbent LECs currently provide physical collocation. Under California's "preferred outcomes" approach,[91] the "preferred outcome" concerning physical collocation is similar to rules the FCC previously established for physical collocation.[92] California presently allows LECs to offer virtual or physical collocation. New York applies a comparably efficient interconnection (CEI) standard to both new entrants and incumbent LECs, that requires that interconnection be technically and economically comparable to actual physical collocation. New York does not have detailed physical collocation requirements under the CEI standard, but rather leaves such matters to negotiation between the parties.[93] Currently in New York, Rochester Telephone and NYNEX both offer physical collocation to satisfy the CEI standard. In other states, incumbent LECs currently provide only virtual collocation. Illinois, which had originally mandated physical collocation, recently adopted rules regarding virtual collocation. The state of Washington also permits virtual collocation and has stated that such charges for virtual collocation should be no higher than charges for physical collocation. The Washington Commission also concluded that, if meet point interconnection arrangements are established by mutual agreement, decisions about where equipment is placed will be resolved as part of that negotiation, and therefore a virtual collocation tariff probably would not be necessary.[94] Finally, Florida permits LECs to offer both virtual and physical collocation, but has left the details of such arrangements to negotiation between the parties.

70. We seek comment on whether one or more of these state collocation policies would be suitable for use as a national standard. We also seek comment on state policies that commenters believe are inconsistent with the goals of the 1996 Act, or that are inadvisable from a policy perspective. In this regard, parties are specifically asked to comment on the possible consequences of requiring new entrants with regional or national business plans to comply with divergent state requirements.

71. In light of our tentative conclusion that we should adopt national guidelines concerning physical and virtual collocation, we seek comment on what specific regulations would foster opportunities for local competition. For example, section 251(c)(6) mandates physical

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[91] *See Competition for Local Exchange Service*, Order, Decision 95-12-056, (Cal. Pub. Util. Comm'n Dec. 20, 1995).

[92] The Commission's rules regarding mandatory physical collocation are no longer in effect. *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. FCC*).

[93] *NYPSC Interconnection Order*.

[94] Washington Utilities and Transportation Commission, Fourth Supplemental Order, Docket UT-941464 et al. (Oct. 1995).

collocation at the "premises" of an incumbent LEC. Consistent with the ordinary meaning of the term "premises,"[95] we tentatively conclude that "premises" includes, in addition to incumbent LEC central offices or tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We seek comment on this tentative conclusion. We also seek comment on whether structures housing LEC network facilities on public rights of way, such as vaults containing loop concentrators, or similar structures should be deemed to be LEC premises. We note that collocation of facilities inside such structures would still be subject to the technical feasibility and space availability limitations of section 251(c)(6).

72. Section 251(c)(6) requires the incumbent LEC to provide for the physical collocation of equipment necessary for interconnection or access to unbundled network elements. We seek comment on what types of equipment competitors should be permitted to collocate on LEC premises. Section 251(c)(6) also allows the incumbent LEC to provide virtual collocation instead of physical collocation in specific locations if "the local exchange carrier demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations."[96] We seek comment on whether we should establish guidelines for states to apply when determining whether physical collocation is not practical for "technical reasons or because of space limitations," and, if so, what those guidelines might be.[97] For example, to what extent, if any, should the risk of reduced reliability or other harm to the network be considered as a technical reason justifying a refusal to offer physical collocation, and what type of evidence must the LEC offer to prove its claim? We also seek comment on whether national guidelines may be necessary to prevent anticompetitive behavior by the manipulation or unreasonable allocation of space by either the incumbent LEC or new entrants.

73. Finally, we seek comment on whether we should adopt comprehensive national standards for collocation by readopting our prior standards governing physical and virtual collocation that we established in the *Expanded Interconnection* proceeding.[98] In that proceeding, we addressed standards governing, among other things, the following: space exhaustion and allocation; types of equipment that could be placed, or designated for placement, in incumbent LEC offices; points of entry; insurance; and exemptions from physical collocation requirements based on space limitations. We also seek comment regarding whether we should modify those standards, in light of: (1) the new statutory requirements; (2) disputes that have arisen in the

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[95] "Premises" is defined as "a building together with its grounds or other appurtenances." Random House College Dictionary 1046 (revised ed. 1980).

[96] 1996 Act, sec. 101, § 251(c)(6).

[97] In the *Special Access Expanded Interconnection Order*, the Commission established general rules addressing collocation space limitation. The Commission stated that LECs should be required to provide virtual collocation when space for physical collocation is exhausted, and that LECs should be required to offer central office space on a first-come, first-served basis. The Commission also required that, although LECs did not have to relinquish space reserved for their future use, they were required to consider interconnector demand for central office space when remodeling or building new central offices just as they consider demand for other services when undertaking such projects. *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369 (1992). In the *Special Access Physical Collocation Designation Order*, the Commission set forth for investigation issues relating to space warehousing *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909 (1993).

[98] *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369; *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Virtual Collocation Expanded Interconnection Order*, 9 FCC Rcd 5154; *Virtual Collocation Designation Order*, 10 FCC Rcd 11116.